

89-7 45 (1)

Supreme Court, U.S.

FILED

OCT 16 1989

JOSEPH F. SPANIOLO, JR.
CLERK

No. 8- _____

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989**

THE CITY OF ROCKWALL, TEXAS,
Petitioner,

v.

- GAYLA MCKEE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JAMES S. LUDLUM
LUDLUM & LUDLUM
Third Floor
The Vaughn Building
Austin, Texas 78701
(512) 476-6000

Counsel for the Petitioner

October 15, 1989

32 pp



QUESTION PRESENTED

In a damage suit prosecuted under 42 U.S.C. §1983 of The Federal Civil Rights Act against a municipality and any of its officials or officers, should the right of an interlocutory appeal be extended to a municipality whenever (1) its officials and officers are entitled to their qualified immunities from suit and (2) it is determinable that none of its officials or officers have committed any constitutional wrong?



PARTIES TO THE PROCEEDING

The petitioner is The City of Rockwall, Texas. The respondent is Gayla McKee.

**PARTIES TO THE PROCEEDING
IN THE COURT OF APPEALS**

The City of Rockwall, Texas, who is the petitioner, and Rockwall Police Officers Trey Chaney and Gary Fleetwood were the defendants/appellants in the Court of Appeals.

Gayla McKee, who is the respondent, was the plaintiff/appellee in the Court of Appeals.



TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	2
RELEVANT STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION.....	10
I. Legal Basis For The "Signal".	13
II. Practical Reasons For Granting The "Signal".....	19
CONCLUSION.....	25
CERTIFICATE OF SERVICE.....	26
APPENDIX (BOUND IN SEPARATE VOLUME)	



TABLE OF AUTHORITIES

Cases	Page
<u>City of Los Angeles v. Heller</u> , 475 U.S. 796 (1986).....	8, 14, 15, 16, 17, 19
<u>Cohen v. Beneficial Industrial Loan Corporation</u> , 337 U.S. 541 (1949).....	9, 10, 19
<u>Coopers & Lybrand v. Livesay</u> , 437 U.S. 463 (1978).....	9, 10, 19
<u>Harlow v. Fitzgerald</u> , 457 U.S. 800, 814 (1972).....	12, 22
<u>Heller v. Bushey</u> , 759 F.2d 1371, 1372-1373 (1985).....	14
<u>Jacquez v. Procunier</u> , 801 F.2d 789, 791 (5th Cir. 1986).....	12, 22
<u>McKee v. City of Rockwall, Texas</u> , 877 F.2d 409 (5th Cir. 1989).....	1, 3, 4, 6, 7, 8, 9, 10, 17, 18
<u>Mitchell v. Forsyth</u> , 472 U.S. 511 (1985).....	8, 11, 21
<u>Monell v. New York City Department Of Social Services</u> , 436 U.S. 658 (1978)..<	13
<u>Owen v. City Of Independence</u> , 445 U.S. 622 (1980).....	13



TABLE OF AUTHORITIES - Continued

Page

Statutes, Rules and Congressional Materials

28 U.S.C. §1254.....	2
42 U.S.C. §1983.....	2, 6, 9, 13, 16, 20
Fed. R. Civ. P. 12(b)(6).....	7
Fed. R. Civ. P. 56.....	7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. _____

THE CITY OF ROCKWALL, TEXAS,
Petitioner,

v.

GAYLA MCKEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as McKee v. City of Rockwall, Texas, 877 F.2d 409 (5th Cir. 1989) and appears in Appendix A. The opinion of the United States District for the Northern District of Texas - Dallas Division, not reported, appears in Appendix B.

1

1

1

1

1

1

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. §1983 states, in relevant part, that:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

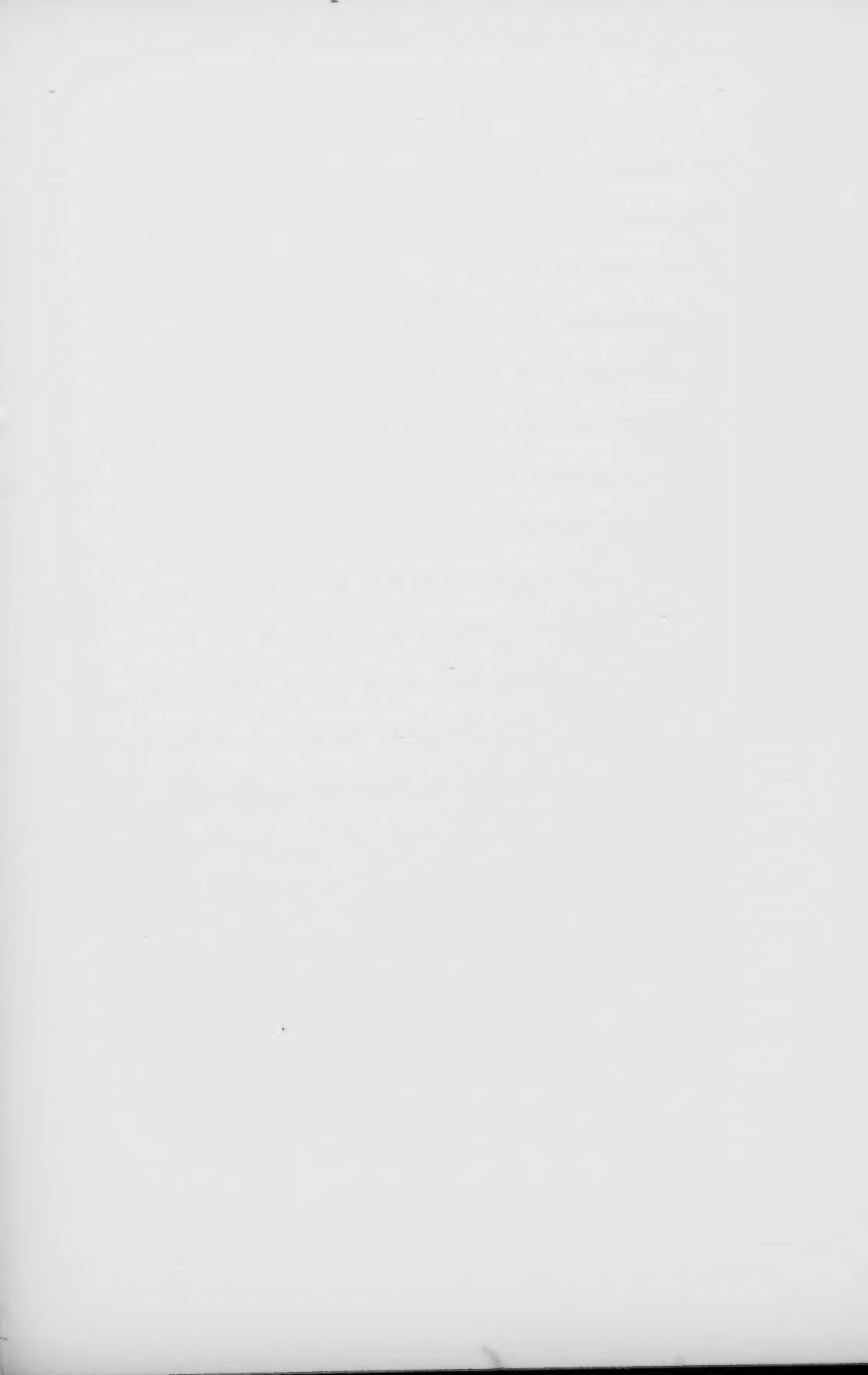
On April 30, 1986, Gayla McKee telephoned the Rockwall Police Department dispatcher that she had been assaulted and was



being held in the apartment of Harry Streetman. (App. D-164) Rockwall Police Officers Gary Fleetwood and John Parrish were separately dispatched to the Streetman apartment. Officer Fleetwood arrived first. While he was seeking entry to the Streetman apartment through the front door, he was approached from behind by Gayla McKee, at which time he learned that not only was McKee not trapped in the apartment but also had made the call to the police dispatcher from a telephone at a nearby convenience store. (App. D-164-5) Although she stated that Streetman had assaulted her, she appeared to neither Officer Fleetwood (App. D-164-5) nor Officer Parrish (App. F-184-5) to bear any physical signs of an assault. She appeared to them to be angry rather than hurt. (App. D-165 and App. F-185) She demanded the arrest of Streetman. Those facts are uncontroverted. McKee v. City of Rockwall, 877 F.2d 409, 411 (5th Cir. 1989).



A dispute does exist concerning the willingness or unwillingness of Officers Fleetwood and Parrish to arrest Streetman. McKee contends that she requested that Officers Fleetwood and Parrish take her to the police station so that she could make a complaint against Streetman. She purportedly was refused because she was inappropriately dressed and claims that she was told that she could go to the police station and file her own complaint but that she probably would not want to do so after she calmed down. McKee v. City of Rockwall, supra, at Pages 410 and 411. Officers Fleetwood and Parrish contend that they did not have a warrant to arrest Streetman and had no basis for a warrantless arrest and told McKee that it would be necessary for them to take her to the police station to make a complaint but that she refused. (App. D-164-9 and App. F-183-7) Off-duty Police Officer Trey Chaney drove by, spoke



briefly with Officers Fleetwood and Parrish, and left without performing any law enforcement function. (App. E-139-141)

It is uncontroverted, however, that while Officer Fleetwood remained with Streetman at his apartment, Officer Parrish drove McKee to an address specified by McKee but undisclosed to Streetman and out of his sight and left her there. (App. D-167 and App. F-186) The address to which McKee directed Officer Parrish to take her was the residence of a brother of Streetman. It was there that she called her parents to pick her up. Streetman arrived. McKee then returned to her disabled vehicle in the parking lot of the complex where Streetman lived to wait for her parents. McKee and Streetman became involved in an altercation, during which McKee was cut on her right leg. McKee v. City of Rockwall, supra, at Page 410.



McKee sued The City of Rockwall, Texas, and Rockwall Police Officers Gary Fleetwood and Trey Chaney.¹ In factual terms, McKee alleged that she had been injured as a result of the refusal of the officers to arrest Streetman and further that their refusal to arrest Streetman was grounded in a municipal policy of The City of Rockwall not to make arrests in domestic violence situations in which the victim was a female. In legal terms, McKee sought damages pursuant to 42 U.S.C. §1983, claiming that her rights under the Equal Protection Clause had been violated.

The City of Rockwall and Officers Fleetwood and Chaney initially moved to

¹ After this case was already on appeal to the United States Court of Appeals for the Fifth Circuit, McKee filed her Plaintiff's First Amended Original Complaint in the United States District Court and added Officer Parrish as a party defendant. His affidavit detailing the events of which he is aware is attached to the Motion Of The City of Rockwall For Summary Judgment. (App. F-183-7)



dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and subsequently and separately for summary judgment pursuant to Federal Rule of Civil Procedure 56. (App. D, E and F) The United States District Court denied all motions. (App. A) The City of Rockwall and Officers Fleetwood and Chaney took an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals found "that McKee has presented no evidence at all that the City pursues a discriminatory policy" (877 F.2d 410), "that there is a 'complete failure' of proof with respect to McKee's allegation of differential treatment of the victims of domestic violence" (877 F.2d 416) and that "the individual officers must be dismissed because McKee has failed to provide any evidence tending to show that the officers' inaction was a consequence of discrimination



against a protected minority." (877 F.2d 416)

On appeal, The City of Rockwall conceded that the "collateral orders" exception to the final judgment rule, by which the United States Supreme Court in Mitchell v. Forsyth, 472 U.S. 511, 524-526 (1985) extended the right of an interlocutory appeal to governmental officials and officers who were asserting their qualified immunities from suit, does not extend to a municipality; however, The City of Rockwall sought an extension of the doctrine to afford a municipality the same right of an interlocutory appeal whenever (1) its officials and officers are entitled to their qualified immunities and (2) it is determinable that none of its officials or officers committed any constitutional wrong, citing specifically the holding of the United States Supreme Court in City of Los Angeles v. Heller, 475 U.S. 796 (1986) that



a municipality cannot be liable on a damage claim under 42 U.S.C. §1983 of The Federal Civil Rights Act whenever its involved officer commits no constitutional wrong and further contending that no probative evidence has been adduced by McKee of the commission of any constitutional wrong. The Court of Appeals conceded that precluding a municipality "from taking an interlocutory appeal along with individual defendants may indeed result in some inefficient litigation"², further observed that "[w]e are not free, however, to shape the boundaries of our jurisdiction through a general equitable balancing of policy factors" (noting that the general rules of Coopers & Lybrand v. Livesay³ and Cohen v. Beneficial Industrial Loan Corporation⁴ provide that an

² 877 F.2d 413

³ 437 U.S. 463 (1978)

⁴ 337 U.S. 541 (1949)



interlocutory appeal is permissible only with respect to a decision which conclusively determines a disputed question and which involves a claim of rights separable from, and collateral to, rights asserted in the action)⁵, and that "we cannot expand our appellate jurisdiction without some signal from the Supreme Court that it is willing to relax the requirements of Coopers and Cohen."⁶

REASONS FOR GRANTING THE PETITION

It is through this Petition For Writ Of Certiorari that The City of Rockwall seeks such "a signal" from the United States Supreme Court to permit a municipality the right of an interlocutory appeal along with its officials and officers whenever (1) its officials and officers are entitled to their

⁵ 877 F.2d 412

⁶ 877 F.2d 413



qualified immunities from suit and (2) it is determinable that none of its officials or officers have committed any constitutional wrong.

The extension of the right of an interlocutory appeal to a municipality under those specific circumstances is not only important but also is vital (1) to preserving and implementing the very considerations of avoiding substantial litigation involvement which lead the United States Supreme Court in Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) to extend the judicially-created immediate right of interlocutory appeal to governmental officials and thereby avoid "the general costs of subjecting officials to the risks of trial - distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"; further, as the United States Supreme Court stated in Harlow



v. Fitzgerald, 457 U.S. 800, 814 (1986) the avoidance of "the expenses of litigation, the diversion of officials from pressing public issues, and the deterrence of able citizens from acceptance of public service"; and, as recognized and followed by the United States Court of Appeals for the Fifth Circuit in Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986), the avoidance of subjecting public officials "to trial or the vagaries of modern pretrial discovery", and (2) to simply end litigation at a stage beyond which it is no longer warranted under the facts and law and thereby preserve litigation economics to the parties and judicial economy to the Courts.



A. Legal Basis For The "Signal"

With respect to the establishment of liability against a municipality on a 42 U.S.C. §1983 claim and broadly summarized for the purpose of this analysis, the United States Supreme Court has held that (1) liability can be established against a municipality only for an actionable policy or custom which proximately causes the deprivation of a constitutional right, Monell v. New York City Department Of Social Services, 436 U.S. 658, 692, 694-695 (1978); (2) although a non-judicial and non-prosecutorial governmental official or officer may enjoy a qualified immunity from suit, a municipality does not enjoy any qualified immunity from suit, Owen v. City of Independence, 445 U.S. 622, 657 (1980); and (3) a municipality cannot be liable, when and if the employee of the municipality committed no constitutional wrong and even if the



municipality may have authorized an actionable policy, City of Los Angeles v. Heller, 475 U.S. 796, 799-800 (1986).

Because the decision of the United States Supreme Court in Heller is central to the position of The City of Rockwall, a brief discussion of that case is warranted. In Heller, the plaintiff was arrested for suspicion of drunk driving. After he failed a series of field sobriety tests and was notified that he would be taken to a police station for a breath test, he became belligerent when an attempt was made to handcuff him, and an altercation ensued, during which he fell through a plate glass window and was injured.⁷ The case was submitted to a jury without it being instructed on a qualified immunity or any other affirmative defense that might have been available to the police officer. The

⁷ See Heller v. Bushey, 759 F.2d 1371, 1372-1373 (1985)



jury returned a verdict for the police officer, following which the United States District Court then dismissed the action against The City of Los Angeles and its Police Commission, "concluding that if the police officer had been exonerated by the jury there could be no basis for assertion of liability against the city or the persons constituting its Police Commission".⁸ The United States Supreme Court, in upholding the judgment of dismissal of the United States District Court and in overturning the reversal of that same judgment by the United States Court of Appeals for the Ninth Circuit, stated, among other things, that:

"They [The City of Los Angeles and its Police Commission] were sued only because they were thought legally liable for Bushey's [the police officer's] action; if the latter [the police officer] inflicted no constitutional injury on respondent [the plaintiff], it is inconceivable that petitioners could be liable to respondent." (475 U.S. 799)

⁸ 475 U.S. 798



* * * *

"If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." (475 U.S. 799)

* * * *

"The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion." (475 U.S. 799)

The basic teaching of the United States Supreme Court in Heller, therefore, is that a municipality cannot be liable on a damage claim asserted against it under 42 U.S.C. §1983, if its involved official or officer committed no constitutional wrong. The dispositive parallel between Heller and the instant case is that no police officer in either case committed any constitutional wrong. In Heller, that determination was made by jury verdict without the jury having been instructed on qualified immunity or any

other affirmative defense for the police officer. In the instant case, the Court of Appeals made that determination by finding that "McKee has failed to provide any evidence⁹ tending to show that the officers' inaction was a consequence of discrimination against a protected minority"¹⁰ in failing to arrest Streetman before he later injured her. In Heller, the United States Supreme Court upheld the dismissal by the United States District Court of the municipality in light of the fact that its police officer committed no constitutional wrong, and The City of Rockwall argues that since it has been determined by the Court of Appeals that the inaction of its officers was not a consequence of discrimination but instead was based upon their own assessment of lack

⁹ In response to the summary judgment motion.

¹⁰ 877 F.2d 416

of probable cause¹¹, the case against it as a municipality likewise should be dismissed at this stage.

To permit dismissal of this stage requires that the right of an interlocutory appeal be extended to a municipality whenever (1) its officials and officers are entitled to their qualified immunities from suit and (2) it is determinable that none of its officials or officers have committed any constitutional wrong.

Except in limited instances permitted expressly by statute, the right of an inter-

¹¹ McKee was inconsistent by first telling the police dispatcher that she was trapped by Streetman in his apartment after being beaten in contrast to her later showing up outside his apartment and stating that she had actually telephoned the police department from a nearby convenience store, thereby confirming that she was not trapped inside his apartment. The uncontroverted allegations of the officers are that McKee bore absolutely no signs of physical assault. The fact is that McKee was hostile, Streetman was calm. See 877 F.2d 414. See also App. D-164-9 and App. F-183-7.

locutory appeal otherwise is purely a creature of judicial creation. The City of Rockwall respectfully submits that the extension of the right of an interlocutory appeal to it as a municipality can be accomplished either by an extension or modification of the doctrine in Coopers¹² and Cohen¹³ or by creating a new exception and simply by recognizing that, in the narrow type of situation for which it is urged, such a right is entirely consistent with the holding of the United States Supreme Court in Heller¹⁴ that a municipality cannot be liable when its involved official or officer commits no constitutional wrong.

¹² 437 U.S. 463

¹³ 337 U.S. 541

¹⁴ 475 U.S. 796



B. Practical Reasons For Granting The "Signal"

The first reason for extending the right of an interlocutory appeal to a municipality on claims asserted against it under 42 U.S.C. §1983 within the suggested parameters is that it will create a consistent pattern of appellate review whenever its officials or officers test their qualified immunities by interlocutory appeal but without creating a qualified immunity defense for a municipality by requiring that its dismissal be based upon the higher standard of the commission of no constitutional wrong by its officials and officers.

The second reason for the extension of the right is that without it, the major protections intended by the United States Supreme Court to be afforded to governmental officials and officers through their right of immediate interlocutory appeal on their qualified immunity defenses will be defeated



entirely. The considerations which lead to the extension of the judicially-created immediate right of an interlocutory appeal to governmental officials when their motions for summary judgment or to dismiss were denied most specifically included "the general costs of subjecting officials to the risks of trial - distraction of officials from their governmental duties, inhibition of discretionary actions, and deterrence of able people from public service"¹⁵; the recognition by the United States Supreme Court that ". . . it cannot be disputed seriously that claims frequently run against the innocent as well as against the guilty-at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the

¹⁵ Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).



deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'"¹⁶; and the avoidance of subjecting public officials "to trial or the vagaries of modern pretrial discovery"¹⁷. The simple and undeniable truth of the matter is that whenever a municipality is subjected to suit, its involved officials and officers must participate actively in the defense of the lawsuit, if the municipality is to be defended properly. A municipality in litigation cannot defend itself in a vacuum-separate and apart from the necessary involvement of its officials and officers.

¹⁶ Harlow v. Fitzgerald, 457 U.S. 800, 814 (1972).

¹⁷ Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986).

The involvement of officials and officers in the defense of a lawsuit against their municipality invariably entails a review of all involved records, conferences and interviews with counsel to provide essential facts and to discuss and explain documents and records, give depositions and be present often during the depositions of others, and be present at the trial, itself.

The City of Rockwall does not argue that the involvement of its officials and officers should not be required when a plaintiff can adduce probative evidence of the existence of an actionable policy or custom resulting in a constitutional wrong; instead, The City of Rockwall argues simply that the officials and officers of a municipality should not be subjected to pre-trial procedures in defense of a municipality whenever the plaintiff is unable to adduce probative evidence in opposition to a defense motion for summary

judgment showing the existence of an actionable policy or custom that proximately caused a constitutional wrong. Therefore, if the right of an interlocutory appeal is not extended to a municipality under the limited circumstances above suggested, the protections envisioned by the United States Supreme Court for governmental officials and officers who successfully assert their qualified immunities from suit will be defeated.

Finally, if the immediate right of an interlocutory appeal is not afforded to a municipality under the narrow circumstances above suggested, not only will the municipality be subjected to otherwise-unnecessary and avoidable litigation defense costs, but also a waste of judicial economy will result, particularly if the trial court fails to recognize the right of a municipality to be free from suit and the appellate judiciary cannot contemporaneously

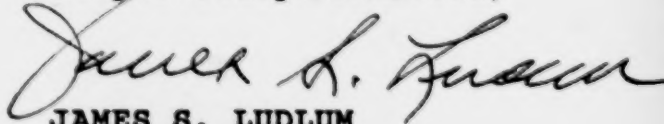
analyze the liability of the municipality at the same time it considers the qualified immunities of governmental officials and officers.

Legal and practical considerations strongly support the "signal" which the Court of Appeals requires, and which the petitioner seeks.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "James S. Ludlum", is written over the typed name.

JAMES S. LUDLUM

LUDLUM & LUDLUM

Third Floor

The Vaughn Building

Austin, Texas 78701

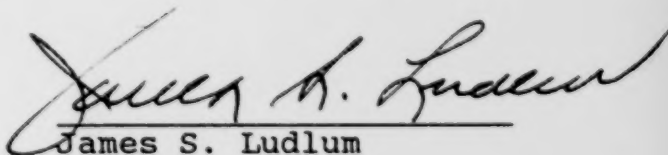
(512) 476-6000

Counsel for Petitioner



CERTIFICATE OF SERVICE

By his signature hereunder affixed, the undersigned counsel of record certifies that contemporaneously in point of date with the transmittal for filing with Clerk of the United States Supreme Court of forty (40) copies of the foregoing and appended Petition For Writ Of Certiorari, three (3) true copies thereof were transmitted through the mails of the United States of America by Certified Mail - Return Receipt Requested - Number P 154 213 918 to Steven B. Thorpe, Esquire, of Crews, Thorpe & Hatcher, 150 Founders Square, 900 Jackson Street, Dallas, Texas 75202.



James S. Ludlum

October 15, 1989